Supreme Court, U.S.
FILED
JUL 24 1981
ALEXANDER L. STEVAS,
CLERK

81-149

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM 1981

SAM COOPER,
Petitioner,

vs.

RICHARD WILLE,
Sheriff of Palm Beach County,.
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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QUESTION PRESENTED

WHETHER IT IS CONSTITUTIONALLY IMPERMISSIBLE TO IMPEACH A DEFENDANT AND HIS PRINCIPAL WITNESS BY CROSS-EXAMINATION AS TO THEIR ALLEGED CONSPIRACY WHEN THE PROSECUTION OF THAT ALLEGED CONSPIRACY ENDED IN AN ORDER OF ACQUITTAL EARLIER IN THE TRIAL AFTER THE PROSECUTOR CONCLUDED THAT HE COULD NOT PROVE HIS CASE.

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OPINIONS BELOW

The decision of the Florida District Court of Appeal, Fourth District, affirming Petitioner's conviction without opinion is reported at 376 So.2d 89. The decison of the Florida Supreme Court, denying review by certiorari is reported at 385 So.2d 755. The unreported opinion and order of the United States District Court, Southern District of Florida, denying Habeas Corpus is at pages 7-19 of the Appendix. The order of the United States Court of Appeals, Fifth Circuit, affirming that denial is reported at 645 F.2d 70 and is at pages 1-6 of the Appendix.

JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28 USC, Section 1254 to review the decision of the United States Court of Appeals for the Fifth Circuit dated April 27, 1981, because of the importance of the question as to the scope of permissible cross-examination of a defendant after one or more counts are terminated in his favor, and because the decision appears to be contrary to this Court's *Ashe v. Swenson,* (1970) 397 US 436 and the Fifth Circuit's own *Wingate v. Wainwright,* (5th Cir. 1972) 464 F.2d 209.

CONSTITUTIONAL PROVISIONS INVOLVED

Involved herein is that part of the Fifth Amendment which provides as follows:

> . . . nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb;

and was applied by this Court in *Ashe v. Swenson*, supra, as the doctrine of collateral estoppel.

STATEMENT OF THE CASE

The history of the case, as gleaned from the Fifth Circuit's opinion (A 2-4) is as follows:

Petitioner was charged initially with grand larceny, two counts, and with conspiracy to commit grand larceny from Constructors, Inc. This company was building a project in Riviera Beach, Florida in which Robert Agerton was the job superintendent. Petitioner's company, Sam Cooper Trucking, contracted to clear the jobsite of debris and grade the terrain. Petitioner submitted periodic bills, which included expenses for dumpage fees at the county dump, for approval by Jack Agerton and forwarding to Constructors, Inc. for payment. Although the county dump was originally used, that use was discontinued and dumpage fees were billed after other sites, where no charge was incurred, were utilized. Agerton was named as an unindicted co-conspirator on Petitioner's conspiracy count.

The State prosecuted upon the theory that billing for the expenses not actually incurred was larceny. During the course of the State's case, the prosecution and the trial court engaged in a discussion of the problems inherent in calling the wife of the alleged unindicted co-conspirator as a witness. Although Agerton had been granted immunity in this case, he had previously been convicted and sentenced in a separate but similar scheme involving another subcontractor on the same construction project. This conviction was presently on appeal. As a result of this discussion the State announced that it would abandon prosecution of the conspiracy count. At the conclusion of the State's case the Petitioner moved

for judgment of acquittal on the remaining counts which was denied. However, at the Petitioner's request the trial court subsequently entered a judgment of acquittal on the conspiracy count noting that the State had "nolle prossed" the count and that jeopardy had attached.

Petitioner defended on the two substantive counts by presenting the testimony of himself and Agerton. The gist of Agerton's testimony, supported by Petitioner's, was that Agerton had agreed to continue paying the dumpage fees because total expenses for the project would be reduced in that use of alternative dumping sites speeded the use of hourly rented dump trucks. During the State's cross-examination various questions were asked which Petitioner contends elicited proof of the conspiracy charge, of which he had been previously acquitted, in violation of the Fifth Amendment's prohibition against double jeopardy. For example, those questions put to Agerton:

> Yet you approved these invoices knowing they were false, didn't you?
>
> Mr. Agerton, isn't it a fact that in return for your approving all these false invoices, Mr. Cooper gave you large amounts of money?
>
> Mr. Agerton, on May 20, 1975, did Mr. Sam Cooper give you a check in the amount of eighteen thousand one hundred thirty four dollars?

and those questions put to Petitioner:

> Isn't it a fact, Mr. Cooper, that it was on that day, it was on the day that this check was

deposited, that you began giving money to Mr. Agerton?

Whether it is a gift sir, or a loan, sir, isn't it a fact that it was not until you received that seventy three thousand dollar check that you began giving Mr. Agerton large amounts of money?

Finally Mr. Cooper, relative to your purported agreement with Mr. Agerton that you should dump wherever you could dump, was there anything secret about this agreement?

The thrust of these questions being that on four separate occasions Agerton had received substantial sums of money from Petitioner and that he had given nothing in return. The State argued that it was attacking the credibility of the testimony and attempting to show bias, prejudice and personal interest in the outcome rather than prove a conspiracy.

As the District Court Judge noted at A 15 , during closing argument, the prosecutor made comments such as:

It took place because these two men plotted to steal from the company.

I submit to you it is simply because Mr. Cooper and Mr. Agerton had not yet had the opportunity to have their meeting.

. . . if you truly believe that Mr. Agerton without complicity, without double deal-

ings, without expecting any reward, without any agreement with Mr. Cooper . . .

Petitioner sought a Writ of Habeas Corpus pursuant to 28 USC, Section 2254. Without evidentiary hearing or argument of counsel, the United States District judge rejected the Petition, holding that collateral estoppel would not bar the use of evidence of other criminal acts for impeachment despite the acquittal. (A 16-18).

The Fifth Circuit affirmed, agreeing that the scope of cross-examination was proper, but also holding that the conspiracy theory was not barred by the conspiracy acquittal in the circumstances of this case. (A 1-2, 5-6).

ARGUMENT

IT IS CONSTITUTIONALLY IMPERMISSIBLE TO IMPEACH A DEFENDANT AND HIS PRINCIPAL WITNESS BY CROSS-EXAMINATION AS TO THEIR ALLEGED CONSPIRACY WHEN THE PROSECUTION OF THAT ALLEGED CONSPIRACY ENDED IN AN ORDER OF ACQUITTAL EARLIER IN THE TRIAL AFTER THE PROSECUTOR CONCLUDED THAT HE COULD NOT PROVE HIS CASE.

It is a now familiar principle of law that the Fifth Amendment prohibition against double jeopardy, as incorporated in the Fourteenth Amendment, bars relitigation of any fact previously determined between the same parties adversely to the proponent. The doctrine of collateral estoppel is elevated to constitutional dimension in the criminal setting, and prevents the use of similar fact evidence after an acquittal.

The Fifth Circuit put it well in *Wingate v. Wainwright*, supra, when it said:

> We hold that under *Ashe* where the state in an otherwise proper prosecution seeks for any purpose to relitigate an issue which was determined in a prior prosecution of the same parties, then the evidence offered for such a relitigation must be excluded from trial and the state must be precluded from asserting that the issue should be determined in any way inconsistent with the prior determination.
>
> It is fundamentally unfair and totally incongruous with our basic concepts of justice to permit the sovereign to offer proof that a defendant committed a specific crime which a jury of that sovereign has concluded he did not commit. Otherwise a person could never remove himself from the blight and suspicious aura which surround an accusation that he is guilty of a specific crime. Wingate was charged with robbing Hellman and Angel and as a result of those charges he endured the perils of trial. He was acquitted of those very charges and that should end the matter.
>
> 464 F.2d at 214-215

Subsequently, the Florida Supreme Court reached the same result based on the latter theory in *State v. Perkins*, 349 So.2d 161 at 163 (Fla. 1977). The same view has also been adopted in *United States v. Keller*, 624 F.2d 1154 (3rd Cir. 1980) and *United*

States v. Mespoulode, 597 F.2d 329 (2nd Cir. 1979). The Seventh Circuit has achieved the same result by holding that the prejudicial nature of collateral crimes far outweighs any lingering relevancy following an acquittal. See *United States v. Phillips*, 401 F.2d 301 (7th Cir. 1968).

Lower Federal Courts have expressed some reservations about applicability of the rule to the circumstances of this case, but there is no reason not to apply it. The acquittal here came for insufficient evidence. It followed the prosecutor's abandonment of prosecution after considering the evidence and what he felt he could prove. The State did not object when the judgment of acquittal was entered (see e.g. *Wainwright v. Sykes*, (1977) 433 U.S. 72) and it did not exercise its right to challenge the order by cross appeal (see 924.07(4), Florida Statutes). The judgment should be unassailable at this point.

Nor should it help Respondent that the prosecutor saw the writing on the wall and gave up mid-trial. Collateral estoppel does not depend on how hard the prosecutor tries, only on the final result. The landmark *Ashe v. Swenson*, 397 U.S. 436 at 447 (1970) was a case where the State treated its first trial as a dry run, honing and polishing its presentation for subsequent cases. To distinguish this case because the State abandoned prosecution is to rely on a distinction without a difference.

It is unnecessary to puzzle over how the acquittal here affects subsequent proceedings where the state advances the same criminal charge anew, in light of the following:

> The State also argues that Wingate has failed to demonstrate that the testimony as to facts sought to be excluded at the trial

were actually concluded by prior acquittal. In view of the State's offer of the evidence of the prior robberies to show a common scheme or modus operandi it is apparent that the State was seeking to broadly relitigate all of the issues in the previous trial in order to assert that Wingate was guilty of these earlier robberies.

Wingate v. Wainwright, supra, footnote 4, 464 F.2d at 214. Here, too, the purported impeachment was meaningless unless the jury believed Petitioner guilty of the very offense he'd just been acquitted on. Thus, the Fifth Circuit was inconsistent when it opined that nothing was foreclosed by Petitioner's acquittal.

What is important at this time is to delineate the effect of an acquittal on other counts being tried at the same time. It is clear from decisions such as *United States v. Lee*, 622 F.2d 787 (5th Cir. 1980), *United States v. Mock*, 604 F.2d 341 (5th Cir. 1979) and *United States v. Gurney*, 418 F.Supp. 1265 (MD Fla. 1976) that acquittal on one or more counts of an indictment bars any effort to relitigate those underlying facts which were necessarily decided against the sovereign when the case comes on for retrial. Such a retrial is like an extension of the original trial. Not only may the use of evidence be limited, but the possible charges and possible sentences may likewise be limited. Lower Federal Courts have struggled mightily to determine the effect of such an acquittal, and this case presents a prime opportunity to deal with many aspects of the issue.

The Fifth Circuit also accepted the District Judge's conclusion that such evidence could be used for impeachment. Both courts thus overlooked that, under Florida law, impeachment of any witness for criminal conduct may only be predicated on whether he has ever been convicted of a crime, and, if so, how many times. In *Fulton v. State,* 335 So.2d 280 (Fla. 1976), a new trial resulted for cross-examination about mere arrests or accusations. Thus, the novel approach sanctioned here is contrary to Florida law. It is like asking "have you ever been acquitted of a crime," but it is much worse, because the alleged crime is named. That is permissible for impeachment purposes only when the evidence meets the criteria for so-called "Williams rule evidence." See *State v. Statewright,* 300 So.2d 674 at 678 (Fla. 1974) and *Shafter v. State,* 374 So.2d 1127 at 1128 (Fla. 1DCA 1979).

The District judge relied upon decisions condoning use of illegally obtained evidence for impeachment, but he overlooked the common thread of those decisions. In each instance the evidence used was reliable and did not adversely affect the integrity of the fact finding process. Indeed, the salutary effect on the search for truth is the very justification for using such evidence. Thus, *United States v. Havens,* 446 U.S. 620 (1980) and *Walder v. United States,* 347 U.S. 62 (1954) involved use of reliable evidence seized illegally. *Havens* expressly restates the reliability requirement. In *Harris v. New York,* 401 U.S. 222 at 224 (1971) a trustworthy statement obtained without full Miranda warnings was used for impeachment. To the same effect is *Oregon v. Hass,* 420 U.S. 714 (1975). But, the statement could not have been used if it were obtained by actual coercion, *New Jersey v. Portash,* 440 U.S. 450 at 458-459

(1979), *Mincey v. Arizona*, 437 U.S. 385 at 397-398 (1978). *Jenkins v. Anderson*, 447 U.S. 231 (1980) condoned use of prearrest silence for impeachment, but there is nothing unreliable about that evidence. A contrary result was reached in *Doyle v. Ohio*, 426 U.S. 610 (1976) as to silence at time of arrest, because the fact that a subject is told he need say nothing and that it can't be used against him makes his failure to say anything inherently ambiguous and its use fundamentally unfair.

Doyle v. Ohio, supra, makes it clear that even impeachment is subject to constitutional guarantees. The Fifth Circuit surely implied that its collateral estoppel decision would apply to impeachment when it relied in footnote 7 of *Wingate v. Wainwright*, supra (464 F.2d at 215) on cases rejecting use of prior counseless convictions for impeachment. If convictions cannot be used for impeachment for want of counsel, how can acquittals be used. As in *United States v. Phillips*, supra, and *Doyle v. Ohio*, supra, there is so little probative force to such evidence, and so much prejudicial effect as to adversely effect the fact finding process. The unreliability of such evidence is why the Fifth Circuit gave *Wingate* full retroactive effect in *Blackburn v. Cross*, 510 F.2d 1014 at 1019 (5th Cir. 1975). And, as in *Doyle v. Ohio*, supra, it is fundamentally unfair to the accused. If impeachment is somehow different in this context, the state should be able to cite a case where a *Wingate* violation became harmless error when the accused took the stand. It has not done so, and likely cannot, since Blackburn testified and still received a new trial in *Blackburn v. Cross*, supra. The Fifth Circuit rejected the state's claim of harmless error without addressing the possibility that it was permissible impeachment, but a sister Court has consi-

dered the scope of impeachment. In *United States v. Keller*, 624 F.2d 1154 at 1156-1157 and 1160 (3rd Cir. 1980), the Court relied on collateral estoppel to reject use of evidence of other drug transactions on some of which there had been acquittals as cross-examination and rebuttal to Keller's testimony that he was entrapped.

It is respectfully submitted that the case at bar raises important issues as to the effect of a partial acquittal in subsequent trial proceedings, and the scope of permissible impeachment. The decision sought to be reviewed appears contrary to rulings of this Court and other Federal Courts, including other decisions by the Fifth Circuit. This Court should issue its Writ of Certiorari to determine these issues and settle these conflicts.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a copy of the foregoing has been furnished, by mail, to Russell S. Bohn, Esquire, Assistant Attorney General, 111 Georgia Avenue, room 204, West Palm Beach, Florida 33401, this _____ day of July, 1981.

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APPENDIX

APPENDIX I

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT
UNIT B

NO. 80-5897
Summary Calendar

SAM COOPER,

Petitioner-Appellant,

versus

RICHARD WILLE, SHERIFF
PALM BEACH COUNTY, ET. AL.,

Respondents-Appellees.

Appeal from the United States District Court for the Southern District of Florida

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(April 27, 1981)

Before HILL, FAY, and ANDERSON,
Circuit Judges.

PER CURIAM:

Appellant, Sam Cooper, seeks reversal of the District Court's denial of his petition for writ of habeas corpus, 28 U.S.C. § 2254, attacking on double jeopardy grounds, by the doctrine of collateral estoppel, his conviction on two counts of grand larceny. Because we conclude that the prosecution's

questioning on cross-examination was not directed at evidential facts necessarily determined in a previous action, we affirm the District Court's denial of relief.

Appellant was charged initially with grand larceny, two counts, and with conspiracy to commit grand larceny from Constructors, Inc. This company was building a project in Riviera Beach, Florida in which Robert Agerton was the job superintendent. Appellant's company, Sam Cooper Trucking, contracted to clear the jobsite of debris and grade the terrain. Appellant submitted periodic bills, which included expenses for dumpage fees at the county dump, for approval by Jack Agerton and forwarding to Constructors, Inc. for payment. Although the county dump was originally used, that use was discontinued and dumpage fees were billed after other sites, where no charge was incurred, were utilized. Agerton was named as an unindicted co-conspirator on appellant's conspiracy count.

The State prosecuted upon the theory that billing for the expenses not actually incurred was larceny. During the course of the State's case, the prosecution and the trial court engaged in a discussion of the problems inherent in calling the wife of the alleged unindicted co-conspirator as a witness. Although Agerton had been granted immunity in this case, he had previously been convicted and sentenced in a separate but similar scheme involving another subcontractor on the same construction project. This conviction was presently on appeal. As a result of this discussion the State announced that it would abandon prosecution of the conspiracy count. At the conclusion of the State's case the appellant moved for judgment of acquittal on the remaining counts which was denied. However, at the appellant's

request the trial court subsequently entered a judgment of acquittal on the conspiracy count noting that the State had "nolle prossed" the count and that jeopardy had attached. *Transcript of Trial* at 340-41.

Appellant defended on the two substantive counts by presenting the testimony of himself and Agerton. The gist of Agerton's testimony, supported by appellant's, was that Agerton had agreed to continue paying the dumpage fees because total expenses for the project would be reduced in that use of alternative dumping sites speeded the use of hourly rented dump trucks. During the State's cross-examination various questions were asked which appellant contends elicited proof of the conspiracy charge, of which he had been previously acquitted, in violation of the Fifth Amendment's prohibition against double jeopardy. For example, those questions put to Agerton:

> Yet you approved these invoices knowing they were false, didn't you? *Transcript of Trial* at 418.
>
> Mr. Agerton, isn't it a fact that in return for your approving all these false invoices, Mr. Cooper gave you large amounts of money? *Id.*
>
> Mr. Agerton, on May 20, 1975, did Mr. Sam Cooper give you a check in the amount of eighteen thousand one hundred thirty four dollars? *Id.* at 419.

and those questions put to appellant:

> Isn't it a fact, Mr. Cooper, that it was on that day, it was on the day that this check was deposited, that you began giving money to Mr. Agerton?[1] *Id.* at 536.
>
> Whether it is a gift sir, or a loan, sir, isn't it a fact that it was not until you received that seventy three thousand dollar check that you began giving Mr. Agerton large amounts of money? *Id.* at 537.
>
> Finally Mr. Cooper, relative to your purported agreement with Mr. Agerton that you should dump wherever you could dump, was there anything secret about this agreement? *Id.* at 553.

The thrust of these questions being that on four separate occasions Agerton had received substantial sums of money from appellant and that he had given nothing in return. The State argued that it was attacking the credibility of the testimony and attempting to show bias, prejudice and personal interest in the outcome rather than prove a conspiracy. The trial court ruled in favor of the State and was affirmed, without opinion, on direct appeal, Cooper v. State, 376 So.2d 89 (4 D.C.A. 1979) **cert. denied,** 385 So.2d 755 (Fla. 1980).

II.

Appellant's arguments, in esse, are that the Fifth Amendment's prohibition of double jeopardy in-

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[1]The check referred to was for $73,000 received by appellant's company for site preparation on the job in question.

cludes the doctrine of collateral estoppel, Ashe v. Swenson, 397 U.S. 436, 444 (1970); United States v. Ballard, 586 F.2d 1060 (5th Cir. 1978), whether the issues sought to be relitigated were determined in a separate former trial or in the present trial on a different charge. See Wingate v. Wainwright, 464 F.2d 209 (5th Cir. 1972). Although, perhaps, a close question, we remain unpersuaded that this is the precise issue raised by the facts of this case. Cf. United States v. Rey, No. 80-1033, slip op. 5369, 5374 (5th Cir. March 30, 1981). While it is certainly true that collateral estoppel applies to evidentiary facts as well as to ultimate facts, 464 F.2d at 213, the Court in *Ashe* speaks in terms of prohibiting a relitigation of issues actually determined at a previous trial. *Id.*

In order to determine what was relitigated, if at all, we must examine the entire record of the previous action and if a fact has not necessarily been previously determined, the possibility that it may have been does not prohibit its reexamination. United States v. Ballard, 586 F.2d 1060, 1064 (5th Cir. 1978). This inquiry should be done with realism and rationality. United States v. Lee, 622 F.2d 787, 790 (5th Cir. 1980). Realistically, the record before this Court shows that no litigation of the issues or facts brought up in the appellant's direct examination and amplified upon by the State on cross-examination actually occurred. The trial court signed the final judgment of acquittal because the State had "nolle prossed" the count, i.e. no evidence at all had been presented. It follows that the nonexistence of personal interest and collusion between appellant and Agerton was not necessarily determined by the state trial court in making its decision to render a judgment of acquittal. See also

State v. McCord, 385 So.2d 1112, 1114-15 (Fla. 4 D.C.A. 1980); State v. Perkins, 349 So.2d 161, 163 (Fla. 1976). Therefore, there cannot be collateral estoppel as to this evidence.[2] Further, although it is not necessary for our resolution of this appeal, it appears that the State's questioning was within the bounds of both state and federal rules on cross-examination.[3] See, e.g., Benitez v. State, 350 So.2d 1109 (Fla. 3 D.C.A. 1977); Grant v. United States, 368 F.2d 658 (5th Cir. 1966); Fed. R. Evid. 608(b); Fla. Stat. § 90.608 (1980).

The decision of the District Court is **AFFIRMED.**

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[2]The decision in United States v. Keller, 624 F.2d 1154 (3rd Cir. 1980) does not appear contrary to our position in this case.

---

[3]During a discussion of the objection being made by defense counsel, the trial judge stated:

> I am letting it in on the issue of the credibility and the believability of the witness the state now attacks. That is their announced reason for pursuing this line of testimony and that is the reason I feel I am obliged to authorize it and not on the theory of conspiracy.

Transcript of Trial at 82.

APPENDIX II

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-8158-CIV-JE

SAM COOPER,	)	
Petitioner,	)	
vs.	)	FINAL JUDGMENT
RICHARD WILLE, Sheriff of Palm Beach County,	)	
Respondent.	)	

For the reasons stated in the Memorandum Opinion entered herein, it is thereupon

ORDERED AND ADJUDGED as follows:

1. This petition for writ of habeas corpus is denied.

2. The bond previously set herein shall be rescinded upon such date and time as Cooper may be required by futher Order of the Fifteenth Judicial Circuit Court of Florida to commence service of his sentence of confinement.

DONE AND ORDERED at Miami, Florida, this

16th day of September, 1980.

UNITED STATES DISTRICT JUDGE

cc: Russell S. Bohn, Ass't.
Attorney General
West Palm Beach, Florida

Charles Musgrove, Esquire
T. J. Cunningham, Esquire

APPENDIX III

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 80-8158-CIV-JE

SAM COOPER,)

Petitioner,)

vs. MEMORANDUM OPINION

RICHARD WILLE,)
Sheriff of Palm Beach)
County,)

Respondent.)
)

Samuel Cooper, who is represented by private counsel, has filed a petition for writ of habeas corpus pursuant to 28 U.S.C. §2254, attacking his conviction upon two counts of grand larceny entered on June 3, 1977, after jury trial in Case No. 77-489-CF, in the Circuit Court of the Fifteenth Judicial Circuit of Florida, at Palm Beach County. Cooper was placed upon consecutive periods of five years probation, with the special condition that one year be served in the Palm Beach County Jail. He was further ordered to pay the costs of his prosecution, in the total amount of $7,000. Cooper is presently at liberty upon a personal surety bond set by this Court after hearing, pending resolution of this habeas corpus proceeding.

For its consideration with this petition, the Court

has briefs filed by the parties, and the entire record on direct appeal, including the briefs.

Cooper raises a single issue in this petition, framed in the petition as:

> Whether the conviction was obtained by a violation of the protection against double jeopardy.

This issue was raised by Cooper on direct appeal, and the conviction was affirmed, without opinion. *Cooper v. State*, 376 So.2d 89 (Fla. 4 Dist. 1979). The Florida Supreme Court denied certiorari. *Cooper v. State*, ___ So. 2d. ___ (Fla., No. 58, 179, April 29, 1980). State remedies have been exhausted.

Cooper was originally charged by Information with two counts of grand larceny. Thereafter, an amended Information was filed, charging the two counts of grand larceny and a third count of conspiracy to commit grand larceny. Cooper was the sole defendant named in the indictment. An unindicted alleged co-conspirator, Jack Agerton, was named in the conspiracy count.

Essentially, Cooper was charged with grand larceny from Constructors, Inc., and with conspiracy to commit such grand larceny. Constructors, Inc., was building a project in Riviera Beach, upon which Robert Agerton was the job superintendent. Cooper's company, Sam Cooper Trucking, contracted to clear the job area of debris and grade the terrain. Cooper submitted periodic bills, which were approved by Jack Agerton and forwarded to Constructors, Inc., for payment.

The bills submitted for the dates alleged in the Information included expenses for dumpage fees incurred at the county dump. In fact, although the county dump was originally used, that use was discontinued. Dumpage fees were billed after other

sites, where no charge was incurred, were utilized.

The State prosecuted upon the theory that billing for the expenses not actually incurred was larceny. The dates alleged in the substantive counts were the issuance dates of two payment checks from Constructors, Inc., to Cooper's company. The checks were deposited in Cooper's bank account.

During the course of the state's case, the Court initiated a discussion with counsel about whether the state could proceed with its intention, indicated in opening statement, to call the wife of the alleged unindicted co-conspirator, Jack Agerton. The question concerned the husband-wife privilege, complicated by the husband's status as an unindicted co-conspirator. Although Agerton was not actually charged in the Cooper case, and had been granted immunity, he had previously been convicted and sentenced to five years on a separate scheme involving a different subcontractor on the same construction project. That case was on appeal. The discussion between the Court and counsel was lengthy, but reached no final resolution. (TR/237-255).

On the following morning, the State announced that it would abandon prosecution of the conspiracy count. (TR/256).

At the conclusion of the State's case, the defense moved for judgment of acquittal on the substantive charges, counts one and two, and the motion was denied. (TR/328-335).

Thereafter, the Court stated that the State had "nolle prossed" its case on the conspiracy count, but entered a judgment of acquittal on that count at the request of the defense, noting that jeopardy had attached, and that Cooper could not be reprosecuted on that charge. (TR/340-341).

During the defense case, both Cooper and Agerton testified, and were cross examined by the State. Cooper contends that this cross examination elicited proof of the conspiracy charge, of which he had been previously acquitted, in violation of the Fifth Amendment prohibition against double jeopardy, as incorporated in Fourteenth Amendment due process.

Cooper defended, in part, by presenting the testimony of Jack Agerton to the effect that he had agreed to continue payment of the dumpage fees knowing that other dump sites would be utilized, because total expenses would be reduced. Dumping at alternate sites speeded the use of the trucks, which were rented hourly. (TR/390). Cooper himself testified to the same facts. (TR/463-468).

Although this petition does not specify which portions of the state record Cooper contends are in violation of the Fifth Amendment, some specific portions were designated in the Brief of Appellant filed on direct appeal.

Cooper complains of the following questions put by the prosecutor on cross-examination:

> Yet you approved these invoices knowing they were false, didn't you? (TR/418).
>
> Mr. Agerton, isn't it a fact that in return for your approving all these false invoices, Mr.Cooper gave you large amounts of money? (TR/418).
>
> Mr. Agerton, on May 20, 1975, did Mr. Sam Cooper give you a check in the amount of eighteen thousand one hundred thirty four dollars? (TR/419).

The Brief of Appellant then makes the general allegation that:

> Inquiries inferring that appellant and Agerton conspired to steal from Contractors, Inc. continued relentlessly. (R419-440). (Brief, p. 11).

In fact, the cross examination did continue along the same lines, and elicited the testimony that on four separate occasions during May and June of 1975, Agerton had received checks from Cooper, totalling $37,425.06 (TR/419-420). Agerton acknowledged that he had personally received proceeds close to $27,000 from these checks (TR/421), and that Cooper "so far" had received nothing in return for the money. (TR/422). Agerton maintained that the money was a loan. (TR/424, 425-428).

After the above events, defense counsel objected upon the grounds that the Court had already directed a verdict of not guilty upon the conspiracy charge, and sought to have the testimony stricken. (TR/431). The state responded that it was only attacking Agerton's credibility, attempting to show bias, prejudice, and personal interest in the outcome, in that Agerton owed Cooper money. (TR/432). The defense again said the testimony went to show conspiracy but the Court ruled as follows:

> I am not letting it in on that theory. I am letting it in on the issue of the credibility and the believability of the witness the state now attacks. That is their announced reason for pursuing this line of testimony and that is the reason I feel I am obliged to authorize it and not on the theory of

conspiracy. (TR/433).

Defense counsel declined to request a contemporaneous limiting jury instruction. (TR/434-435).

Cooper testified in his own defense. Again, this petition does not refer to specific portions of the record. The Brief of Appellant (p. 11) argued that Cooper was required to defend himself against the conspiracy charge during the entire cross examination. The specific questions quoted in the Brief of Appellant were as follows:

> Isn't it a fact, Mr. Cooper, that it was on that day, it was on the day that this check was deposited, that you began giving money to Mr. Agerton? (TR/536).
>
> Whether it is a gift sir, or a loan, sir, isn't it a fact that it was not until you received that seventy three thousand dollar check that you began giving Mr. Agerton large amounts of money? (TR/537).
>
> Finally Mr. Cooper, relative to your purported agreement with Mr. Agerton that you should dump wherever you could dump, was there anything secret about that agreement? (TR/553).

The first two of these questions referred to a check for $73,000 received by Cooper's company for site preparation on the job in question. (TR/534-535). The third was one of several questions referring to the "agreement" between Cooper and Agerton. (TR/553-555).

Finally, Cooper points to the following comments

of the prosecutor during closing arguments:

> It took place because these two men plotted to steal from the company. (TR/630).
>
> I submit to you it is simply because Mr. Cooper and Mr. Agerton had not yet had the opportunity to have their meeting. (TR/635-632).
>
> . . . if you truly believe that Mr. Agerton without complicity, without double dealings, without expecting any reward, without any agreement with Mr. Cooper . . . (TR/693).

This petition frames the issue in terms of double jeopardy. This is not the precise issue, however, since the double jeopardy clause prohibits a second prosecution for the same offense, and conspiracy to commit a crime and the crime itself are clearly two separate offenses. *Pinkerton v. United States,* 328 U.S. 640 (1946); *King v. United States,* 565 F.2d 356 (5 Cir. 1978); *Curtis v. United States,* 546 F.2d 1188, **rehearing en banc denied,** 550 F. 2d 41 (5 Cir.), **cert denied,** 431 U.S. 908 (1977). There is ordinarily no bar to prosecution for both a conspiracy and the substantive offenses alleged to have been the object of the conspiracy. *Pereira v. United States,* 347 U.S. 1 (1974); *United States v. Cowart,* 595 F.2d 1023 (5 Cir. 1979); *United States v. Garcia,* 589 F.2d 249 (5 Cir. 1979); *United States v. Pacheco,* 489 F.2d 554 (5 Cir. 1974); *United States v. Jasso,* 442 F.2d 1054 (5 Cir. 1971).

It has been established since *Ashe v. Swenson,* 397 U.S. 436 (1970), however, that the Fifth Amendment guarantee against double jeopardy, as applied to the

states through the Fourteenth Amendment, includes the doctrine of collateral estoppel. This bars a state from relitigating issues of fact which must necessarily have been determined in a former trial. *Ashe v. Swenson*, 397 U.S. 436, 444 (1970); *United States v. Ballard*, 586 F.2d 1060 (5 Cir. 1978), and cases cited therein.

An analysis of this case under the doctrine of collateral estoppel would require resolution of at least two preliminary issues:

1. Whether the events which terminated this prosection for conspiracy, involving a nolle prosequi prior to conclusion of the state's case, were the equivalent of an acquittal for purposes of collateral estoppel.

2. If so, what issues of fact were necessarily determined favorably to Cooper by that acquittal.

Such an analysis would be complex under the circumstances of this case.

The doctrine of collateral estoppel, however, even if applicable to this case, would not bar the cross-examination and argument under attack by this petition.

The State's case in chief had been concluded prior to admission of this testimony and argument. It was not offered by the State for the purpose of relitigating the charge of conspiracy but instead was elicited upon cross-examination, as impeachment definitely tending to show bias and prejudice, and as argument in direct response to the theory of the defense.

Traditionally, evidence otherwise inadmissable in the prosecution case in chief, having been obtained as the result of an unlawful search, interrogation, or the like, is admissable as impeachment. *United States v. Havens,* _____ U.S._____ (No. 79-305, May 27, 1980); *Oregon v. Hass,* 420 U.S. 714 (1975); *Harris v. New York,* 401 U.S. 222 (1971); *Walden v. United States,* 347 U.S. 62 (1954); *Agnello v. United States,* 269 U.S. 20 (1925); *United States v. Fogelman,* 581 F.2d 1167 (5 Cir. 1978); *United States v. Caron,* 474 F.2d 506 (5 Cir. 1973).

The policy behind the rule was restated by the Supreme Court less than four months ago:

> It is essential, therefore, to the proper functioning of the adversary system that when a defendant takes the stand, the government be permitted proper and effective cross-examination in an attempt to elicit the truth. The defendant's obligation to testify truthfully is fully binding on him when he is cross-examined. His privilege against self-incrimination does not shield him from proper questioning. *United States v. Havens, supra* at _____.

If such impeachment is not barred by the Fifth Amendment guarantee against self incrimination, it is not barred by the doctrine of collateral estoppel, which is a facet of the Fifth Amendment guarantee against double jeopardy.

The petitioner asserts that "any notion" that "mere impeachment" cannot violate Constitutional principles was "laid to rest" by *Doyle v. Ohio,* 426 U.S. 610 (1976). The *Doyle* case prohibits the use for impeachment of a defendant's silence after his

arrest and after the giving of the **Miranda** warnings. The rationale of the case is that the **Miranda** warnings implicitly inform an arrestee that silence will carry no penalty. The use of a defendant's silence for impeachment is very different from the use of prior inconsistent statements, or evidence of specific factual events to impeach exculpatory testimony given by a defendant.

The *Doyle* decision is limited to its facts. Indeed, the Supreme Court has refused to extend its *Doyle* holding even to impeachment by prearrest silence. *Jenkins v. Anderson,* _____ *U.S.* _____ *(No. 78-6809, June 10, 1980). To apply Doyle* to the facts of this case would be to reject *United States v. Havens, supra,* decided four years subsequent to *Doyle.*

The evidence and argument under attack in this petition was admitted by the trial Court as impeachment. (TR/433). The doctrine of collateral estoppel is inapplicable under these circumstances.

No showing having been made that Cooper is in custody in violation of the Constitution or laws of the United States, this petition for writ of habeas corpus must be denied, and a separate Final Judgment to that effect shall be entered.

DONE AND ORDERED at Miami, Florida, this 16th day of September, 1980.

UNITED STATES DISTRICT JUDGE

cc: Russell S. Bohn, Ass't
Attorney General
West Palm Beach, Florida

Charles Musgrove, Esquire
T. J. Cunningham, Esquire